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ISSUES OF RACE IN THE AGE OF OBAMA

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The August 16, 2009 *New York Times Book Review* includes an essay, *Race and Diversity in the Age of Obama*, by Orlando Patterson.¹ The essay is the third in a series of essays in the *Book Review* “exploring dominant themes and currents of thought in particular areas of American life.”² Patterson’s essay maps out the ethno-racial issues that exist (or one might say persist) in the United States, now that Barack Obama, an African-American, is president. A professor of sociology at Harvard,³ his perspective is primarily socioeconomic and cultural. My essay will use Patterson’s essay as a guide to map out similar issues, but from a legal perspective.

Race and Diversity in the Age of Obama begins with the observation that Barack Obama’s historic election was made possible by “two great converging forces” that occurred during the middle of the twentieth century, “the civil rights revolution and the changes engendered by the Immigration Act of 1965.”⁴ The civil rights revolution resulted in “the rapid dismantling of Jim Crow and the inclusion of black Americans in politics, the military, the middle class and popular culture.”⁵ The Immigration and Nationality Act of 1965 “set in motion vast demographic and social changes that have altered the nation’s ethno-racial landscape.”⁶

Patterson then presents statistics on Americans who are foreign-born.⁷ Just over twelve and a half percent of the total American population is

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¹ Orlando Patterson, *Race and Diversity in the Age of Obama*, N.Y. TIMES, Aug. 16, 2009, Book Rev., at 23.

² *Id.*

³ *Id.*

⁴ *Id.*; see Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

⁵ Patterson, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

foreign-born, with a little over half from Latin America and a quarter from Asia. Hispanics are now the largest ethnic group in the United States, displacing blacks. "Hispanics are a varied collection of ethnic groups" who "are not, and will never become, a single entity"—neither ethnically nor by economic class.⁸ Hispanic immigration after 1965 has given rise to what Patterson calls the "bogus demographic invention 'non-Hispanic whites.'"⁹ The more meaningful sociological category "is that of people defining themselves as exclusively white," a percentage of the population that Patterson says is currently about eighty percent of the population, due to the fact that almost half of all Hispanics define themselves as "white alone."¹⁰ The real "drama that is now unfolding" is that "the present wave of immigrants and their children are rapidly assimilating into an ever-vibrant American mainstream culture."¹¹ The "one powerful 'master-trend'" that underlies the "varying degrees of success and different patterns of adjustment to America" for immigrants is "surprisingly rapid Americanization."¹² "[F]or nonblacks, assimilation is alive and well in America."¹³ Nor is the assimilation of nonblacks "passive integration into a static, Anglo-Protestant mainstream . . . but an endlessly dynamic two-way cultural process."¹⁴

The "great exception" to this dynamic process is black Americans.¹⁵ A major reason for this, according to Patterson, is black poverty, which, he says, stands at almost twenty-five percent, three times the white rate.¹⁶ This inequality between blacks and whites "is the result of a tragic interaction of socioeconomic and cultural forces."¹⁷ It is "rooted" in a "social structure" of "nearly immutable class, racial and gender prejudice, as well as covert discrimination."¹⁸ Another major reason for the failure of black Americans to assimilate into American culture is, Patterson says, "their chronic hypersegregation," which is "true not only of the great majority of poor blacks but of working-class and middle-class blacks as well."¹⁹ In their private lives, "blacks are almost as isolated from whites today as they were

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

under Jim Crow.”²⁰ Whatever the reasons for this—”persisting covert racism, black racial preferences abetted by identity politics, or both”—”ethno-racial relations” in the United States remain, at their core, “a black-white issue.”²¹

The “two great converging forces” mentioned by Professor Patterson²²—the civil rights movement and the Immigration and Nationality Act of 1965²³—also radically transformed our legal landscape. As Adolph Reed, Jr., a professor of political science at the University of Pennsylvania, states, the civil rights movement took place in a post-World War II activist period “of high insurgency in the struggle against racial segregation . . . specifically and explicitly directed toward full citizenship rights for black Americans and against the system of racial segregation that defined a specific regime of explicitly racial subordination in the South.”²⁴ The legislative and judicial victories of the civil rights movement achieved “a strong practical imperative for stressing the racially invidious aspects of injustices.”²⁵ The truly revolutionary result of the civil rights movement’s victories was the legislative and judicial establishment of an ideal of equality—a kind of racial democracy—in which “classification by race, gender, sexual orientation or any other recognized ascriptive status . . . does not impose explicit, intrinsic or necessary limitations on one’s participation and aspirations in the society.”²⁶ The Immigration and Nationality Act²⁷—enacted a year after the Civil Rights Acts of 1964²⁸ and the same year as the Voting Rights Act of 1965²⁹—eliminated prior legislative quotas based almost solely on the number of United States citizens of Western European national origin.³⁰ For the first time, immigration to the United States was allowed for persons from virtually any place in the world.³¹ After 1965,

²⁰ *Id.*

²¹ *Id.*

²² *Id.*; see also *supra* text accompanying note 4.

²³ Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

²⁴ Adolph Reed Jr., *The Limits of Anti-racism*, LEFT BUS. OBSERVER, Sept. 25, 2009, at 2, 2, 7.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ Pub. L. No. 89-236, 79 Stat. 911.

²⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 2000a to 2000h-6 (2006)).

²⁹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

³⁰ See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 303 (1996) (discussing the discriminatory effect of the national origins quota system).

³¹ See *id.* at 297-298 (stating that race was no longer a factor in the U.S. regulation of immigration); see also Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 816 & n.24 (2007) (noting progress from a “national origins quota system”

the Act's effects converged with the civil rights revolution to extend the ideal of equality to nonblack immigrant minorities, who, with other immigrants, have transformed America's demographic and ethno-political landscape.³²

What the civil rights movement's ideal of equality and its strategy of seeking legal redress for specific and racial grievances does not address, however, is "the deep and deepening patterns of inequality and injustice embedded in the ostensibly 'neutral' dynamics of American capitalism."³³ The ideal of equality embodied in civil rights movement, as Professor Reed states, "took precedence over the redistribution of wealth We live under a regime now that is capable simultaneously of including black people and Latinos, even celebrating that inclusion as a fulfillment of democracy, while excluding poor people"—"disproportionately black and Latino"—"without a whimper of opposition."³⁴ This, Reed adds, is a markedly different attitude toward equality from the positions of black activists and scholars in the 1940s, who understood that "so long as such dynamics persisted without challenge, black people and other similarly stigmatized populations would be clustered on the bad side of the distribution of costs and benefits."³⁵ These scholars and activists understood that "the struggle for racial justice"—"the frame of reference for any black mass politics and protest activity"—was inseparable from the "general struggle for social and industrial democracy."³⁶

Legal issues of ethno-racial equality and democracy continue, of course, to exist in the age of Obama. The numerous issues of racial equality that form the legal legacy of the civil rights movement—voting rights, affirmative action, employment discrimination, for example—remain as present as pressing as ever.³⁷

What also exists—as both Patterson and Reed attest to³⁸—is the fact of the astonishing economic disparities between black and white Americans.

that "applied only to the Eastern Hemisphere" to "a single global quota").

³² See Patterson, *supra* note 1; *supra* notes 5–6 and accompanying text; see also Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1611 (2009) (explaining that during the civil-rights era, "Congress, state legislatures, and the courts strove to enact 'equality before the law,' through vehicles such as *Brown v. Board of Education* . . . , the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Immigration Act of 1965") (footnotes omitted).

³³ Reed, *supra* note 24, at 2, 3.

³⁴ *Id.*

³⁵ *Id.* at 3, 7.

³⁶ *Id.* at 3.

³⁷ See Janai S. Nelson, *Minority Voting Rights and the Myth of Post-Racialism*, 25 J. CIV. RTS. & ECON. DEV. (forthcoming 2010).

³⁸ See Patterson, *supra* note 1; Reed, *supra* note 24.

These disparities, too, present issues of racial equality and racial justice, especially during what is now being called The Great Recession. Barbara Ehrenreich describes the economic situation of black Americans in an August 4, 2009 essay, *The Destruction of the Black Middle Class*, posted on her blog.³⁹ Writing during the Gates-Crowley affair,⁴⁰ Ehrenreich observes that what has been “[l]eft out of the ensuing tangle of commentary on race and class [is] the increasing impoverishment—or, we should say, re-impoverishment—of African Americans as a group. In fact,” she continues, “the most salient and lasting effect of the current recession may turn out to be the decimation of the black middle class,” almost a third of which “was already in danger of falling out of the middle class at the start of the recession.”⁴¹ For African Americans,” Ehrenreich says, “the recession is over.”⁴² The recession for black Americans “occurred between 2000 and 2007, as black employment decreased by 2.4 percent and incomes declined by 2.9 percent.”⁴³ The “black recession” left “one third of black children . . . in poverty and black unemployment—even among college graduates—consistently . . . at about twice the level of white unemployment. That was the black recession. What’s happening now is a *depression*.”⁴⁴ Although The Great Recession “is changing everything,” “redrawing the class contours of America in ways that will leave us more polarized than ever, and . . . white middle and working classes” are being “profoundly hurt[.],” “the *depression* being experienced by people of color threatens to do something on an entirely different scale, and that is to eliminate the black middle class.”⁴⁵

As Professor Reed maintains, any solution to economic racial inequality must be political.⁴⁶ Race is one of the protected classes within the legal construct of racial democracy; poverty is not.⁴⁷ The solution to economic

³⁹ See Barbara Ehrenreich & Dedrick Muhammed, *The Destruction of the Black Middle Class*, BARBARA’S BLOG, http://ehrenreich.blogs.com/barbaras_blog/2009/08/the-destruction-of-the-black-middle-class.html (Aug. 4, 2009).

⁴⁰ See Don Van Natta Jr. & Abby Goodnough, *2 Cambridge Worlds Collide in Unlikely Meeting*, N.Y. TIMES, July 27, 2009, at A13 (discussing “the heated national dialogue about race” that erupted after Henry Louis Gates Jr., a “star black Harvard professor,” was arrested by Sgt. James Crowley, a “veteran white police officer”).

⁴¹ Ehrenreich & Muhammed, *supra* note 39(citing “a study by Demos and the Institute for Assets and Social Policy”).

⁴² *Id.* (emphasis in original).

⁴³ *Id.*

⁴⁴ *Id.* (emphasis in original).

⁴⁵ *Id.* (emphasis in original).

⁴⁶ See Reed, *supra* note 24, at 2, 3 (preferring political resolution of injustice to fruitless debate over whether injustice ought to be labeled “racism”).

⁴⁷ Compare, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[A]ll racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” (quoting

racial inequalities must be included in legislation. The process of enacting legislation is, of course, inherently both legal and political.

On September 23, 2009, Christian E. Weller, a Senior Fellow for the Center for American Progress Action Fund and a professor in the Department of Public Policy and Public Affairs, University of Massachusetts, Boston, presented written testimony for the United States House of Representatives Committee on Oversight and Government Reform.⁴⁸ “Leveling the Playing Field: How to Ensure Minorities Share Equitably in the Economic Recovery and Beyond” begins by stating that The Great Recession, which began in December, 2007, was then in its twenty-first month. It is a recession, Weller says, that “has affected many people and many sectors of the economy. Businesses are hurting and laying off workers, who in turn are having a harder time finding a new job than at any point since 1948 due to this being the longest recession since the Great Depression.”⁴⁹ Unemployment exacerbates “troubles elsewhere: Foreclosures and credit card defaults are at record highs, while the personal bankruptcy rate—the number of bankruptcies per 1,000 households—has risen by 64.5 percent since the end of 2007 when the U.S. economy entered the recession.”⁵⁰ During this Great Recession, “[s]ome groups have felt more economic pain than others,” as “African-Americans and Hispanics have lost more economic ground and done so more quickly than their white counterparts, . . . and the economic fortunes of minorities have fallen from lower levels than those of whites to begin with.”⁵¹ As a result, “the gap in the economic security between minorities and whites is widening in this recession, as it had in previous ones.”⁵²

Professor Weller’s written testimony examines “annual, quarterly, and monthly data on the different economic experiences of whites, African Americans, and Hispanics during this recession and prior ones.”⁵³ Comparisons are made on unemployment, employment growth, earnings,

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)) with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (“[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

⁴⁸ CHRISTIAN E. WELLER, SENIOR FELLOW, CTR. FOR AM. PROGRESS ACTION FUND, LEVELING THE PLAYING FIELD: HOW TO ENSURE MINORITIES SHARE EQUITABLY IN THE ECONOMIC RECOVERY AND BEYOND 1 (2009), http://www.americanprogressaction.org/issues/2009/09/pdf/minorities_testimony.pdf (submitted as testimony to the House Comm. on Oversight and Gov’t Reform).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

income, health insurance coverage, retirement savings plans, home ownership, and poverty.⁵⁴ “The data,” Weller says, “show that there are apparent structural problems such as labor market segmentation, credit market steering, and discrimination in the U.S. economy and particularly in the labor market that present an unlevel playing field for minorities.”⁵⁵ Weller highlights his conclusion from the data that the recession “has heightened losses and widened gaps between minorities and whites.”⁵⁶

Professor Weller offers policy recommendations and conclusions.⁵⁷ His policy recommendations include: congressional stimulus legislation along the lines of The American Recovery and Reinvestment Act, with a focus on minorities; congressional extensions of unemployment benefits; legislation that creates “‘green jobs’ in low-income communities”;⁵⁸ congressional enactment of the Employee Free Choice Act;⁵⁹ legislation that lowers costs for small businesses; legislation that controls energy costs; congressional enactment of “comprehensive health reform”;⁶⁰ legislation that increases minority homeownership; and congressional enactment of legislation to regulate “financial, mortgage, and credit markets,”⁶¹ and the establishment of an independent federal regulatory body “‘focused on consumer protections . . . to protect consumers from unfair lending practices.’”⁶² There have been, of course, millions of such prescriptive proposals, at every cultural and political level and dimension of American society, since The Great Recession began. Professor Weller’s written testimony is relatively unique because it directly addresses ethno-racial economic inequalities, which, for the most part, are ignored.

I end this essay on issues of race, during this, the second year of Barack Obama’s presidency, with the not too promising words—at least as to the urgency of these issues—from Professor Weller’s conclusion: “Policymakers’ to do list is long and growing as the nation attempts to move beyond this economic low point. However, addressing the disparities

⁵⁴ See *id.* at 3–7 (noting that data from the previous business cycle evidences lost ground for minorities in various economic categories).

⁵⁵ *Id.* at 1.

⁵⁶ *Id.* at 8.

⁵⁷ See *id.* at 17–20 (discussing various steps that could be taken to help remedy the difficult economic circumstance).

⁵⁸ *Id.* at 18.

⁵⁹ The Act would help close the wage and benefit gap between minorities and whites by “giv[ing] workers more bargaining power with employers by making it easier to join a union.” *Id.* at 18.

⁶⁰ *Id.* at 19.

⁶¹ *Id.*

⁶² *Id.* at 20 (quoting ANDREW JAKABOVICS & JEFF CHAPMAN, CTR. FOR AM. PROGRESS, UNEQUAL OPPORTUNITY LENDERS? ANALYZING RACIAL DISPARITIES IN BIG BANKS’ HIGHER-PRICED LENDING 1, 3 (2009), http://www.americanprogress.org/issues/2009/09/pdf/tarp_report.pdf).

between minorities' and whites' economic experiences should be added to that list."⁶³

⁶³ *Id.* at 20. On Martin Luther King Jr. Day, *New York Times* columnist Bob Herbert observed that despite the primacy of economic justice in Dr. King's vision of equality, and the ardor with which he sought it, "[t]he loudest voices"—especially among policymakers—"against poverty and economic injustice of all kinds have long since faded," as "[w]e honor Dr. King with a national holiday, but his long campaign for economic justice has been all but forgotten." Bob Herbert, Op-Ed., *Blacks in Retreat*, N.Y. TIMES, Jan. 18, 2010, at A31.